



Honorable August B. Landis
United States Bankruptcy Judge



Entered on Docket
February 25, 2014

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

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In re:)	Case Nos. 14-10355-abl and
)	14-10357-abl
MARTIFER AURORA SOLAR,)	
LLC,)	Jointly Administered under
)	Case No. 14-10355-abl
<input type="checkbox"/> Affects Martifer Aurora Solar,)	
LLC)	Chapter 11
<input type="checkbox"/> Affects Martifer Solar USA, Inc.)	Hearing Date: February 21, 2014
<input checked="" type="checkbox"/> Affects all Debtors)	Hearing Time: 9:30 a.m.

**INTERIM ORDER ON DEBTORS' SECOND MOTION FOR ORDER
PURSUANT TO 11 U.S.C. § 364 AND FED. R. BANKR. P. 4001(c): (I)
AUTHORIZING DEBTORS TO OBTAIN POST PETITION FINANCING; (II)
GRANTING RELATED RELIEF; AND (III) SCHEDULING FINAL HEARING¹**

This matter came on for hearing before the Court at the date and time specified in the caption pursuant to the Second Motion for Order Pursuant to 11 U.S.C. § 364 and FED. R. BANKR. P. 4001(c): (I) Authorizing Debtors to Obtain Postpetition Financing; (II) Granting Related Relief; and (III) Scheduling Final Hearing as amended² filed by Martifer Aurora Solar,

¹ In this Order, references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the Clerk of the Court.

² The motion as originally filed by Martifer is docketed at ECF No. 85. The motion was subsequently amended. *See* ECF No. 101. For purposes of this interim order, ECF Nos. 85 and 101 are referred to in the collective as the "motion."

1 LLC and Martifer Solar USA, Inc. (collectively “Martifer”); creditor Cathay Bank’s objection
 2 thereto³; Martifer’s reply to Cathay Bank’s objection⁴ and the joinder in that reply⁵ filed by the
 3 proposed lender, Martifer Solar, Inc. Brett A. Axelrod and Dawn M. Cica appeared on behalf of
 4 Martifer. Reed S. Waddell and Natalie M. Cox appeared on behalf of Cathay Bank. Samuel A.
 5 Schwartz appeared on behalf of Martifer Solar, Inc. Other appearances were noted on the
 6 record.

7 The Court has reviewed Martifer’s motion; the supporting declarations of James Wong⁶
 8 and Klaus Bernhart⁷; Cathay Bank’s objection; the reply filed by Martifer; and the joinder in the
 9 reply filed by proposed lender Martifer Solar, Inc. To the extent that the Court admitted
 10 documents into evidence and made findings of fact and conclusions of law on the record during
 11 the course of the February 21, 2014 hearing, that evidence and those findings of fact and
 12 conclusions of law are incorporated into this written order pursuant to FED. R. CIV. P. 52, made
 13 applicable to this contested matter pursuant to FED. R. BANKR. P. 9014(c) and 7052. The Court
 14 has also considered the arguments of counsel at the February 21, 2014 hearing⁸, and is fully
 15 advised as to the issues pending before it.

16 The Court concludes that it has jurisdiction over Martifer’s jointly administered chapter
 17 11 reorganization cases pursuant to 28 U.S.C. § 1334, 28 U.S.C. §157(a), and U.S. District Court
 18 L.R. 1001(b)(1). The Court also concludes that the contested matter generated by Martifer’s

19 ³ ECF No. 195

20 ⁴ ECF No. 203

21 ⁵ ECF No. 205

22 ⁶ ECF No. 86

23 ⁷ ECF Nos. 87 and 204

24 ⁸ At the February 21, 2014 hearing, counsel for all parties were advised that the hearing
 25 was deemed to be a status and scheduling hearing, and if the relief requested in Martifer’s
 26 motion was granted on an interim basis, the Court would “order a further hearing at which oral
 evidence and exhibits will be received[.]” See L.R. 9014(a)(6).

1 motion and the related opposition, reply, and joinder, constitutes a core proceeding pursuant to
2 28 U.S.C. § 157(b)(2)(A) and (D).

3 “A court ... may not approve any credit transaction under subsection (c) [of 11 U.S.C. §
4 364] unless the debtor demonstrates that it has reasonably attempted, but failed, to obtain
5 unsecured credit under section 364(a) or (b).” *See In re Ames Dept. Stores, Inc.*, 115 B.R. 34, 37
6 (Bankr. S.D.N.Y. 1990)(internal citations omitted); *see also Suntrust Bank v. Den-Mark Constr.,*
7 *Inc. (In re Den-Mark Construction, Inc.)*, 406 B.R. 683, 691 (E.D. N.C. 2009)(“Although a
8 debtor is not required to seek credit from every possible source ..., a debtor must show that it
9 made a ‘reasonable effort’ to obtain post-petition financing from other potential lenders on less
10 onerous terms and that such financing was unavailable.”)(*citing In re Showshoe Co., Inc.*, 789
11 F.2d 1085, 1088 (4th Cir. 1986) *and Ames Dept. Stores*, 115 B.R. at 40). “A court must make its
12 decision as to ‘[h]ow extensive the debtor’s efforts to obtain credit must be’ on a case-by-case
13 basis.” *Den-Mark*, 406 B.R. at 691 (*citing In re Reading Tube Indus.*, 72 B.R. 329, 332 (Bankr.
14 E.D. Pa. 1987)). Based upon the record at the February 21, 2014 hearing, the Court concludes
15 that Martifer has carried its burden of showing that it has “reasonably attempted, but failed, to
16 obtain unsecured credit under [11 U.S.C.] sections 364(a) or (b).”⁹ *Ames Dept. Stores*, 115 B.R.
at 37.

17 A bankruptcy court’s discretion to grant a motion for post-petition financing “is to be
18 utilized on grounds that permit reasonable business judgment to be exercised [by the debtor-in-
19 possession] so long as the financing agreement does not contain terms that leverage the
20 bankruptcy process and powers or its purpose is not so much to benefit the estate as it is to
21 benefit a party-in-interest.” *Ames Dept. Stores*, 115 B.R. at 40. Based upon the record at the
22 February 21, 2014 hearing, the Court concludes that Martifer has carried its burden of showing
23 that the decision to file a motion in an effort to obtain the Court’s approval of the post-petition

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25 ⁹*See* Declaration of James Wong, ECF No. 86, pp. 3 - 5 of 44, para. 10 - 14; Declaration
of Klaus Bernhart, ECF No. 87, p. 5 of 44, para. 15.

1 financing reflected in the First Amended and Restated Debtor in Possession Credit Agreement¹⁰
2 was made in the exercise of its reasonable business judgment.¹¹

3 The Court also concludes that the post-petition financing arrangement here will yield a
4 benefit to Martifer's jointly administered bankruptcy estates. Without an infusion of capital,
5 Martifer's ability to reorganize will be severely impaired.¹² This is unsurprising. *See Ames*
6 *Dept. Stores*, 115 B.R. at 36 ("It is given that most successful reorganizations require the debtor-
7 in-possession to obtain new financing simultaneously with or soon after the commencement of
8 the Chapter 11 case.")

9 As the *Ames Dept. Stores* court noted, "[a]cknowledging that Congress, in Chapter 11,
10 delicately balanced the hope of debtors to reorganize and the expectations of creditors for
11 payment, the courts have focused their attention on proposed terms that would tilt the conduct of
12 the bankruptcy case; prejudice, at an early stage, the powers and rights that the Bankruptcy Code
13 confers for the benefit of all creditors; or leverage the Chapter 11 process by preventing motions
14 by parties-in-interest from being decided on their merits." 115 B.R. at 37-38 (citations omitted)
15 Martifer, of course, "is hardly neutral. Its interest is in its own survival[.]" *See Ames Dept.*
16 *Stores*, 115 B.R. at 39. The Court is therefore mindful that the terms of the First Amended and
17 Restated Debtor in Possession Credit Agreement must neither improperly leverage the
18 bankruptcy process and powers, nor confer an inappropriate level of benefit upon a party in
19 interest aside from the Martifer estates. *Id.* at 40.

20 At the February 21, 2014 hearing, counsel for Martifer Solar, Inc., the proposed non-
21 debtor post-petition lender, consulted with his client and then expressly consented to several
22 modifications to the First Amended and Restated Debtor in Possession Credit Agreement. Those

23 ¹⁰ECF No. 87, pp. 9 - 44 of 44.

24 ¹¹*See generally*, Declaration of James Wong, ECF No. 86; Declarations of Klaus
25 Bernhart, ECF Nos. 87 (p. 6 of 44, para. 17) and 204.

26 ¹²*Id.*

1 modifications addressed specific concerns raised by the Court pending a final hearing on
 2 Martifer's motion.¹³ Incorporating those modifications into the First Amended and Restated
 3 Debtor in Possession Credit Agreement tips the balance (although it remains a very close call) in
 4 favor of approving the post-petition financing Martifer seeks pursuant to 11 U.S.C. § 364(c)(1)
 5 on an interim basis, pending a final hearing on its motion.

6 Based upon the record before the Court:

7 **IT IS ORDERED** that the motion is **GRANTED** on an interim basis pursuant to 11
 8 U.S.C. § 364(c)(1), pending a final hearing on Martifer's motion in accordance with L.R.
 9 9014(a)(6), and subject to all of the terms and conditions set forth in this Order.

10 **IT IS FURTHER ORDERED** that a hearing to consider whether the relief granted
 11 under this interim Order should be granted on a final basis shall be held on **March 10, 2014 at**
 12 **9:30 a.m.** (the "Final Hearing").

13 **IT IS FURTHER ORDERED** that the deadline for Cathay Bank to file an objection to
 14 the entry of a final order granting the relief requested in Martifer's post-petition financing
 15 motion is **5 p.m. Pacific time on Monday, March 3, 2014.**

16 **IT IS FURTHER ORDERED** that the deadline for Martifer to file a reply to any timely
 17 objection filed by Cathay Bank is **5 p.m. Pacific time on Thursday, March 6, 2014.**

18 **IT IS FURTHER ORDERED** that Martifer is authorized to enter into the First
 19 Amended and Restated Debtor in Possession Credit Agreement [ECF No. 87, pp. 9 - 44] pending
 20 the Final Hearing, but only after the following revisions have been made to that Agreement:

21 ¹³Those concerns included, without limitation, impairment of Cathay Bank's pre-
 22 bankruptcy subordination agreements with Martifer and non-debtor proposed lender Martifer
 23 Solar, Inc.; provisions in the First Amended and Restated Debtor in Possession Credit
 24 Agreement that create a default (and a 3% increase in the interest rate charged to Martifer on the
 25 post-petition loan) in the event that Cathay Bank continues with its guaranty enforcement action
 26 currently pending against non-debtor proposed lender Martifer Solar, Inc. (*see* California
 Superior Court for Los Angeles County, West District Case No. SC121853); and a carve out for
 \$2 million in professional fees and expenses that may primarily benefit entities other than the
 Martifer estates.

1. The provisions of Article VII, Section 7.1(xi) and (xii) are **WAIVED** through March 10, 2014;
2. Wherever the phrases “allowed or allowable” or “allowed (or allowable)” or “allowed, allowable” appear, they are modified to the single word “allowed”;
3. Article II, Section 2.10 is modified by:
 - a. Deleting the duplicate phrase “in all instances and respects” and
 - b. Deleting the reference to the Carve Out;
4. Article II, Section 2.13(b)(i) is modified by deleting the reference to the Carve Out;
5. Article II, Section 2.13(b)(iii) is modified by deleting the reference to the Carve Out;
6. The choice of law provision in the promissory note appended to the First Amended and Restated Debtor in Possession Credit Agreement [ECF No. 87, p. 44 of 44] is modified to reference Nevada law, thereby making it consistent with the provisions of Article VIII, Paragraph 8.7 of the agreement;
7. Article VII, Section 8.8 is modified by adding the following text:

Nothing in this First Amended and Restated Debtor in Possession Credit Agreement shall affect, alter or impair the rights of Cathay Bank under any pre-bankruptcy Subordination Agreement, and all of Cathay Bank’s rights under any such Subordination Agreement are expressly reserved.

IT IS FURTHER ORDERED that to the extent that the terms of the preceding paragraph of this interim Order differ in any respect from the terms of the First Amended and Restated Debtor in Possession Credit Agreement that is ultimately executed by Martifer, the terms of this interim Order will control.

IT IS FURTHER ORDERED that immediately upon the entry of this interim Order on the docket, and execution of the First Amended and Restated Debtor in Possession Credit

1 Agreement after it has been modified in compliance with this interim Order, Martifer is
2 authorized to borrow up to the Initial Advance Amount, as that term is defined in the First
3 Amended and Restated Debtor in Possession Credit Agreement.

4 **IT IS FURTHER ORDERED** that during the period between the entry of this interim
5 Order and the Final Hearing on March 10, 2014, Martifer's draws against the post-petition loan
6 provided for under the First Amended and Restated Debtor in Possession Credit Agreement and
7 this interim Order shall not exceed the Initial Advance Amount, as that term is defined in the
8 First Amended and Restated Debtor in Possession Credit Agreement.

9 **IT IS FURTHER ORDERED** that pursuant to 11 U.S.C. § 364(c)(1), for all loans made
10 under the First Amended and Restated Debtor in Possession Credit Agreement and this interim
11 Order, post-petition lender Martifer Solar, Inc., shall be and is hereby granted an allowed
12 administrative expense claim in Martifer's jointly administered chapter 11 cases, having priority
13 over all other claims against Martifer, including without limitation all other administrative
14 expenses or other claims arising under Bankruptcy Code sections 105, 326, 328, 330, 331,
15 503(b), 506(c), 507(a), 507(b), 726, 1113 or 1114, *subject and junior in all instances and*
16 *respects only to* Cathay Bank's Superpriority Claim, as that term is defined in Paragraph
17 2.13(b)(iii) of the First Amended and Restated Debtor in Possession Credit Agreement.

18 **IT IS FURTHER ORDERED** that the Carve Out, as defined and provided for under the
19 First Amended and Restated Debtor in Possession Credit Agreement and this interim Order, is
20 **APPROVED.**

21 **IT IS FURTHER ORDERED** that Martifer's authorization to draw upon the post-
22 petition loan provided for under the First Amended and Restated Debtor in Possession Credit
23 Agreement and this interim Order shall terminate on March 10, 2014.

24 **IT IS FURTHER ORDERED** that nothing in this interim Order shall affect, alter or
25 impair the rights of Cathay Bank under any pre-bankruptcy Subordination Agreement, and this
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interim Order is entered without prejudice to any of Cathay Bank's rights under any such pre-bankruptcy Subordination Agreement.

Notice and copies sent through:

CM/ECF ELECTRONIC NOTICING AND/OR BNC

and sent via FIRST CLASS MAIL BY THE COURT AND/OR BNC to:

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